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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 EMMANUEL TYRONE BULL,
12 CDCR #J-45987,

Plaintiff,

13 vs.

14 LARRY SMALL; T. OCHOA;
15 T. BOREN; HURTADO,

16 Defendants.
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Civil No. 11cv0009 DMS (WMC)

**ORDER DISMISSING FIRST
AMENDED COMPLAINT FOR
FAILING TO STATE A CLAIM
PURSUANT TO
28 U.S.C. § 1915(e)(2)(B) & 1915A(b)**

19 **I. Procedural History**

20 On January 3, 2011, Plaintiff, a state inmate currently incarcerated at Calipatria State
21 Prison located in Calipatria, California, and proceeding pro se, filed a civil rights Complaint
22 pursuant to 42 U.S.C. § 1983. Plaintiff did not prepay the \$350 filing fee mandated by 28 U.S.C.
23 § 1914(a); instead, he filed a Motion to Proceed *In Forma Pauperis* (“IFP”) pursuant to 28
24 U.S.C. § 1915(a). On February 17, 2011, the Court granted Plaintiff’s Motion to Proceed IFP
25 and sua sponte dismissed his Complaint for failing to state a claim. *See* Feb. 17, 2011 Order at
26 4-5. Plaintiff was granted leave to file an Amended Complaint in order to correct the
27 deficiencies of pleading identified by the Court. *Id.* After granting Plaintiff two extensions of
28 time, Plaintiff filed his First Amended Complaint (“FAC”) on June 10, 2011.

1 **II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

2 As the Court stated in its previous Order, the Prison Litigation Reform Act's ("PLRA")
 3 amendments to 28 U.S.C. § 1915 obligate the Court to review complaints filed by all persons
 4 proceeding IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility
 5 [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the
 6 terms or conditions of parole, probation, pretrial release, or diversionary program," "as soon as
 7 practicable after docketing." See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these
 8 provisions, the Court must sua sponte dismiss any prisoner civil action and all other IFP
 9 complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim, or which
 10 seek damages from defendants who are immune. See 28 U.S.C. §§ 1915(e)(2)(B) and 1915A;
 11 *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v.*
 12 *Hayes*, 213 F.3d 443, 446 n.1 (9th Cir. 2000) (§ 1915A).

13 Before amendment by the PLRA, the former 28 U.S.C. § 1915(d) permitted sua sponte
 14 dismissal of only frivolous and malicious claims. *Lopez*, 203 F.3d at 1126, 1130. However, 28
 15 U.S.C. § 1915(e)(2) and § 1915A now mandate that the court reviewing an IFP or prisoner's suit
 16 make and rule on its own motion to dismiss before directing that the Complaint be served by the
 17 U.S. Marshal pursuant to FED.R.CIV.P. 4(c)(2). *Id.* at 1127 ("[S]ection 1915(e) not only permits,
 18 but requires a district court to dismiss an in forma pauperis complaint that fails to state a
 19 claim."); see also *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (discussing
 20 § 1915A).

21 "[W]hen determining whether a complaint states a claim, a court must accept as true all
 22 allegations of material fact and must construe those facts in the light most favorable to the
 23 plaintiff." *Resnick*, 213 F.3d at 447; *Barren*, 152 F.3d at 1194 (noting that § 1915(e)(2)
 24 "parallels the language of Federal Rule of Civil Procedure 12(b)(6)"). Here, however, even
 25 presuming Plaintiff's allegations true, the Court finds his First Amended Complaint fails to state
 26 a claim upon which relief can be granted. See 28 U.S.C. §§ 1915(e)(2)(B); 1915A(b); *Lopez*,
 27 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446, n.1.

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1 **A. 42 U.S.C. § 1983**

2 To state a claim under § 1983, Plaintiff must allege that: (1) the conduct he complains
3 of was committed by a person acting under color of state law; and (2) that conduct violated a
4 right secured by the Constitution and laws of the United States. *Humphries v. County of Los*
5 *Angeles*, 554 F.3d 1170, 1184 (9th Cir. 2009) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)).

6 **B. Property Claims**

7 Once again, Plaintiff claims that prison officials have unlawfully confiscated and
8 destroyed his personal property. (FAC at 6.) Where a prisoner alleges the deprivation of a
9 liberty or property interest caused by the unauthorized negligent or intentional action of a prison
10 official, the prisoner cannot state a constitutional claim where the state provides an adequate
11 post-deprivation remedy. *See Zinermon v. Burch*, 494 U.S. 113, 129-32 (1990); *Hudson v.*
12 *Palmer*, 468 U.S. 517, 533 (1984). The California Tort Claims Act (“CTCA”) provides an
13 adequate post-deprivation state remedy for the random and unauthorized taking of property.
14 *Barnett v. Centoni*, 31 F.3d 813, 816-17 (9th Cir. 1994). Thus, Plaintiff has an adequate state
15 post-deprivation remedy and his claims relating to the taking of his property are not cognizable
16 in this § 1983 action, and must be dismissed pursuant to 28 U.S.C. §§ 1915(e)(2) and
17 1915A(b)(1).

18 **C. Retaliation claims**

19 Throughout his First Amended Complaint, Plaintiff claims that he has been subjected to
20 retaliation by Defendants. In order to prevail on a claim of retaliation, Plaintiff must be able
21 to prove the following five factors: “(1) An assertion that a state actor took some adverse action
22 against [Plaintiff]; (2) because of (3) [Plaintiff’s] protected conduct, and that such action (4)
23 chilled [Plaintiff’s] exercise of his First Amendment rights, and (5) the action did not reasonably
24 advance a legitimate correctional goal.” *See Rhodes v. Robinson*, 408 F.3d 559, 567-568 (9th
25 Cir. 2005). (citing *Resnick v. Hayes*, 213 F.3d 443, 449 (9th Cir. 2000); *Barnett v. Centoni*, 31
26 F.3d 813, 815-16 (9th Cir. 1994) (per curiam)). Here, Plaintiff fails to allege any facts to inform
27 the Court whether he was actually engaged in protected conduct or that any of the named
28 Defendants took any action against him because of his exercise of his First Amendment rights.

1 Accordingly, Plaintiff's retaliation claims are dismissed for failing to state a claim upon
2 which relief may be granted.

3 **D. Respondeat Superior**

4 Finally, Plaintiff also seeks to hold Defendants Small and Ochoa liable in their
5 supervisory capacity. However, there is no respondeat superior liability under 42 U.S.C. § 1983.
6 *Palmer v. Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). Instead, "[t]he inquiry into
7 causation must be individualized and focus on the duties and responsibilities of each individual
8 defendant whose acts or omissions are alleged to have caused a constitutional deprivation." *Leer*
9 *v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71
10 (1976)). In order to avoid the respondeat superior bar, Plaintiff must allege personal acts by each
11 individual Defendant which have a direct causal connection to the constitutional violation at
12 issue. *See Sanders v. Kennedy*, 794 F.2d 478, 483 (9th Cir. 1986); *Taylor v. List*, 880 F.2d 1040,
13 1045 (9th Cir. 1989).

14 Supervisory prison officials may only be held liable for the allegedly unconstitutional
15 violations of a subordinate if Plaintiff sets forth allegations which show: (1) how or to what
16 extent they personally participated in or directed a subordinate's actions, and (2) in either acting
17 or failing to act, they were an actual and proximate cause of the deprivation of Plaintiff's
18 constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978). As currently pleaded,
19 Plaintiff's First Amended Complaint fails to set forth facts which might be liberally construed
20 to support an individualized constitutional claim against Defendants Small and Ochoa.

21 Accordingly, the Court must DISMISS Plaintiff's First Amended Complaint for all the
22 reasons set forth above but will provide Plaintiff with the opportunity to amend his Complaint
23 to correct the deficiencies of pleading identified by the Court.

24 **III. CONCLUSION AND ORDER**

25 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

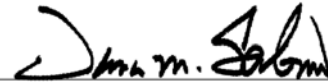
26 Plaintiff's First Amended Complaint is **DISMISSED** without prejudice for failing to
27 state a claim upon which relief may be granted pursuant to 28 U.S.C. § 1915(e)(2)(B) and
28 § 1915A(b). However, Plaintiff is further **GRANTED** forty five (45) days leave from the date

1 this Order is filed in which to file a First Amended Complaint which cures all the deficiencies
2 of pleading noted above. Plaintiff's Amended Complaint must be complete in itself without
3 reference to his previous pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not named and all
4 claims not re-alleged in the Amended Complaint will be considered waived. *See King v. Atiyeh*,
5 814 F.2d 565, 567 (9th Cir. 1987).

6 Further, Plaintiff is cautioned that should he elect not to amend, or if his Amended
7 Complaint still fails to state a claim upon which relief may be granted, the dismissal of this
8 action may hereafter be counted as a "strike" against him pursuant to 28 U.S.C. § 1915(g). *See*
9 *McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

10 **IT IS SO ORDERED.**

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12 DATED: October 12, 2011



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14 HON. DANA M. SABRAW
15 United States District Judge
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